N Carrupaiya v MBf Property Services Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7-22-104 OF 2000
MOHD HISHAMUDIN J
3 AUGUST 2000

Civil Procedure *— Pleadings — Striking out statement of claim — Unconditional appearance filed — Statement of defence served — Whether defendant precluded from making application to strike out plaintiff's statement of claim — Rules of the High Court 1980 O 18 r 19(1)(a)*

The defendants made an application under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC') to strike out the plaintiff's statement of claim. The plaintiff raised a preliminary objection that the defendants were precluded from making the application because: (i) they had filed an unconditional appearance instead of a conditional appearance; and (ii) they had already served their statements of defence before making the application. The senior assistant registrar upheld the preliminary objection and dismissed the defendants' application. The defendants appealed.

Held, allowing the appeal:

(1) The filing of an unconditional appearance does not preclude a defendant from making an application under O 18 r 19. There is nothing in the RHC providing either explicitly or impliedly to that effect. On the contrary, O 18 r 19 expressly provides that such an application may be made at any stage of the proceeding. The words 'at any stage of the proceedings' strongly imply that the right to make an application under O 18 r 19 is not conditional upon the filing of a conditional appearance (see p 394E–F).

(2) An application under O 18 r 19 does not attack the writ but is directed at the statement of claim (or statement of defence as the case may be). Therefore, it is clear that the filing of a conditional appearance has no bearing or relevance to the making of an application under O 18 r 19 (see p 397F).

(3) The remark in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 that the filing of unconditional appearance had deprived the defendant of the right to invoke O 18 r 19 was merely an obiter dicta. For, in that case, whether or not the respondents could file an O 18 r 19 application, was not the issue before the Supreme Court. A mere obiter dicta of a higher court is not binding upon this court (see p 397G).

(4) In view of the words 'at any stage of the proceedings' in O 18 r 19, the mere serving of a statement of defence is not a bar to the making of an O 18 r 19 application (see p 398D–E).

[Bahasa Malaysia summary

Defendan-defendan membuat satu permohonan di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan pernyataan tuntutan plaintif. Plaintif telah membangkitkan bantahan awal bahawa defendan-defendan dihalang daripada membuat permohonan tersebut kerana: (i) mereka telah memfailkan kehadiran tidak bersyarat dan bukannya kehadiran bersyarat; dan (ii) mereka telah pun menyampaikan pernyataan-pernyataan pembelaan mereka sebelum membuat permohonan tersebut. Penolong kanan pendaftar telah mempertahankan bantahan awal tersebut dan menolak permohonan defendan-defendan. Defendan-defendan telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Pemfailan kehadiran tidak bersyarat tidak menghalang defendan daripada membuat sesuatu permohonan di bawah A 18 k 19. Tidak terdapat apa-apa dalam KMT yang memperuntukkan sama ada secara nyata atau tersirat mengenainya. Sebaliknya A 18 k 19 dengan nyatanya memperuntukkan bahawa permohonan sedemikian boleh dibuat di mana-mana peringkat prosiding tersebut. Perkataan-perkataan 'di mana-mana peringkat prosiding tersebut' dengan tegasnya menunjukkan bahawa hak untuk membuat sesuatu permohonan di bawah A 18 k 19 tidak bergantung di atas pemfailan satu kehadiran bersyarat (lihat ms 394E–F).

(2) Sesuatu permohonan di bawah A 18 k 19 tidak bertindak terhadap writ tetapi ia ditujukan kepada pernyataan tuntutan (atau pernyataan pembelaan, seperti mana keadaannya). Oleh itu, adalah jelas bahawa pemfailan sesuatu kehadiran bersyarat tiada kaitan atau hubungan dengan pembuatan sesuatu permohonan di bawah A 18 k 19 (lihat ms 397F).

(3) Kenyataan dalam *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 bahawa pemfailan kehadiran bersyarat telah melucut hak defendan dari hak untuk menggunakan A 18 k 19 adalah hanya satu obiter dicta. Kerana, dalam kes itu, sama ada responden boleh memfailkan satu permohonan A 18 k 19 atau pun tidak, bukannya merupakan isu di hadapan Mahkamah Agung. Obiter dicta sebuah mahkamah yang lebih tinggi semata-mata tidak mengikat mahkamah ini (lihat ms 397G)

(4) Memandangkan perkataan-perkataan 'di mana-mana peringkat prosiding tersebut' dalam A 18 k 19, penyampaian pernyataan pembelaan semata-mata bukannya suatu penghalang kepada pembuatan permohonan A 18 k 19 (lihat ms 398D–E).]

A **Notes**

For cases on striking out statement of claim, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3722–3723.

Cases referred to

B *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 (refd)

Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman [1987] 2 MLJ 633 (refd)

Jamir Hassan v Kang Min [1992] 2 MLJ 46 (refd)

C *Lim Seak Huat v Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 (refd)

Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 2 CLJ 886 (refd)

Tengku Jaffar v Karpal Singh [1993] 3 MLJ 156 (refd)

D **Legislation referred to**

Rules of the High Court 1980 O 12 rr 6, 7, O 18 r 19, (1)(a), O 33 r 2, Form 16

Kelvin Kong (*Tetuan Heng & Mogan*) for the defendants.

Selva Balan Sinnan (*Azman Joseph & Associates*) for the plaintiff.

E

Mohd Hishamudin J: This is an appeal against the decision of the learned senior assistant registrar ('the SAR') , High Court (Civil Division, No 7), Kuala Lumpur. The decision was given on 28 June 2000.

In her decision, the learned SAR dismissed an application (encl 7) by the defendant under O 18 r 19(1)(a) of the Rules of the High Court 1980 F ('the RHC'). In dismissing the application, the learned SAR upheld the preliminary objections raised by the plaintiff at the commencement of the hearing of the application before her.

The preliminary objections were these. First, the plaintiff contended that the defendants were precluded from making the application because G they had filed an unconditional appearance instead of conditional appearance.

Second, and in the alternative, it was argued on behalf of the plaintiff that, even if the fact that they had filed an unconditional appearance does not prevent the defendants from making the application to strike out, nevertheless, they were still precluded from making the application by H reason of the fact that they had already, before making the application, served their statements of defence.

In the present case, the writ summons and the statement of claim were filed on 18 February 2000. The memorandum of appearance was filed on 7 March 2000. The statements of defence of the defendants were filed on I 20 March 2000 and had been served.

The application that led to the present appeal was filed on 17 April 2000.

In the submission before me, the plaintiff maintains the same arguments. A

Thus the first issue before me is: Are the defendants precluded from making an application under O 18 r 19 by reason of the fact that they had filed an unconditional appearance?

As for this first issue, the plaintiff relies on the Supreme Court judgment in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, and two High Court cases, namely, *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 2 CLJ 886 and *Lim Seak Huat v Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336. B

In rebutting the plaintiff's contention in respect of the first issue, the learned counsel for the defendants (the appellants, before me), En Kelvin Kong, in his argument, refers to the provision of O 18 r 19 which reads: C

> Striking out pleadings and indorsements
>
> (1) The Court may *at any stage of the proceedings* order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that — D
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or E
>
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a). F
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> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading. (Emphasis added.)

Emphasizing on the words which I have italicised ('*at any stage of the proceedings*'), the learned counsel submits that the application under O 18 r 19 may be made any at stage of the proceedings, meaning that it can be made at any time in the course of the proceedings, and that the filing of a conditional appearance is not a pre-condition for the making of an O 18 r 19 application. In other words the filing of an unconditional appearance is not a bar to the making of an application under O 18 r 19. G

In support of his argument, the learned counsel relies on *Tengku Jaffar v Karpal Singh* [1993] 3 MLJ 156 and *Jamir Hassan v Kang Min* [1992] 2 MLJ 46. H

I shall first consider the plaintiffs argument. In *Alor Janggus*, Jemuri Serjan CJ (Borneo) delivered the Supreme Court judgment. At p 258 of the judgment, his Lordship said: I

> It was open to the defendants to resort to O 18 r 19 or O 33 r 2 of our RHC but they chose not to do so but to bring up the locus standi issue on their

A application to set aside the injunction. On this ground alone this appeal should succeed. *It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19 but it is still open to them to have recourse to O 33 r 2 if they are so minded.* (Emphasis added.)

B In this case, the proceeding before the High Court was in the nature of an interlocutory application by the defendants (the respondents before the Supreme Court) to set aside an ex parte interlocutory injunction previously granted to the plaintiffs (the appellants before the Supreme Court) to restrain the second defendant (the second respondent before the Supreme Court) from disposing off certain shares to the third defendant (the third C respondent before the Supreme Court). The High Court granted the application to set aside the ex parte interlocutory injunction on the ground, inter alia, that the plaintiffs had no locus standi to commence the writ action against the defendants. Before the High Court, the locus standi issue was raised by the defendants by way of a preliminary objection at the commencement of the hearing of the application to set aside the ex parte D interlocutory injunction.

On appeal by the plaintiffs (who then became the appellants) to the Supreme Court, the court allowed the appeal on several grounds. One of the grounds relates to procedure. The Supreme Court held that it was wrong, procedurally, for the High Court to have allowed the respondents to E raise the issue of locus standi at the hearing of the respondents' application to set aside. The court described the procedure adopted by the High Court (that is to say, the act of allowing the issue of locus standi to be raised) as an 'unorthodox procedure'. The Supreme Court held that the correct procedure was for the respondents to raise the issue of locus standi by way of either an application under O 18 r 19 or an application under O 33 r 2 of F the RHC.

Subsequent to the above Supreme Court decision, in the High Court cases of *Pet Far Eastern* and *Lim Seak Huat*, both cases dealing with an application under O 18 r 19, Abdul Malik Ishak J adopted the above dicta of Jemuri Serjan CJ (Borneo) and ruled that a defendant who has entered G an unconditional appearance is precluded from making an application under O 18 r 19. In other words, a defendant intending to make an O 18 r 19 application must, upon being served with the writ, file a conditional appearance and not an unconditional appearance. This is what the learned judge said in *Pet Far Eastern* (at p 916):

H Finally, the issue raised by Mr Clarence Edwin for the plaintiff in regard to the entry of an unconditional appearance must be considered by this court. The second defendant had entered an unconditional appearance and had served on the plaintiff a statement of defence and by these actions the second defendant would, per se, be precluded from invoking the operation of O 18 r 19(1) of the RHC. I have in *Lim Seak Huat v Malayan United Realty Sdn Bhd* applied the decision of the Supreme Court in *Alor Janggus Soon Seng Trading* I *Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* and I proceeded to say as follows:

> 'There is one other matter that should be addressed. It is this. The defendant filed their unconditional appearance on 8 May 1995 as

reflected at encl 4. The summons in chambers for striking out in encl 11 was dated 23 June 1995 and it was filed on the same date. Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 (SC), speaking for the then Supreme Court had occasion to remark on filing an unconditional appearance in relation to an O 18 r 19 of the RHC's application. This was what his Lordship said:

> "It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19 but it is still open to them to have recourse to O 33 r 2 if they are so minded."

Applying this short principle of law to the facts of the present case, the defendant having entered an unconditional appearance on 8 May 1995 and having filed the statement of defence on 24 May 1995 was thus prevented from filing encl 11 on 23 June 1995.'

That being the case the second defendant was precluded from applying under O 18 r 19(1) of the RHC for striking out the plaintiff's claim. Enclosure 64 must therefore die a natural death in the face of the salutary rule enunciated by the Supreme Court in *Alor Janggus*'s case. The appeal in encl 80 should be dismissed with costs and the decision of the SAR was accordingly upheld. For my part, I look forward to the trial of this action.

With respect, I must differ. In my judgment, the filing of an unconditional appearance does not preclude a defendant from making an application under O 18 r 19. I find nothing in the RHC providing, either explicitly or impliedly, to that effect. On the contrary, O 18 r 19 expressly provides that such an application may be made at any stage of the proceeding. The words 'at any stage of the proceedings', to my mind, strongly imply that the right to make an application under O 18 r 19 is not conditional upon the filing of a conditional appearance. Such an application may be made, for example, after the filing of the statement of defence; or, even after the pleadings are deemed to be closed. Normally, a statement of defence is filed only after the filing of an unconditional memorandum of appearance; or, if a conditional appearance had been previously filed, the statement of defence is filed only after the conditional appearance has, by operation of law, become an unconditional appearance. Every conditional appearance is endorsed with the following stipulation (O 12 r 6 and Form 16 of the RHC):

> This appearance is to stand as unconditional unless the defendant applies within ... [14] ... days to set aside the writ, or service thereof, and obtains an order to that effect.

I find support for the view that I hold in *Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman* [1987] 2 MLJ 633 where Zakaria Yatim J (as he then was) said (at p 635):

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an

A application must be refused after the action has been set down for trial. See *The Supreme Court Practice 1985* Vol 1 p 304.

The above decision was cited with approval and applied by Haidar J (as he then was) in *Jamir Hassan* where his Lordship said (at pp 50–51):

B Before proceeding to consider the merits of the defendant's application under O 18 of the RHC it would not be inappropriate perhaps to consider first the issue of delay raised by Mr TO Thomas. It is not disputed that the defendant filed the application well after the defence and counterclaim was filed. While it may be true that in an O 14 application, it must normally be filed before the defence is delivered, however, in an O 18 application it would appear that there is no such constraint. Order 18 r 19 of the RHC specifically provides C 'The Court may at any stage of the proceedings order to be struck out or amended any pleading ...' (emphasis added). The issue of delay in an O 18 application was considered by Zakaria Yatim J in *Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman* where at p 635 the learned judge said:

> D 'The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial See *The Supreme Court Practice 1985*, Vol 1 p 304.'

E I also find support in *Tengku Jaffar* which, like the present case, dealt with an O 18 r 19 application. There, the court considered, inter alia, the contention by the plaintiff that the filing of an unconditional appearance precluded the defence from making an O 18 r 19 application, Idris J, dismissing the contention, held at pp 165–166:

F One last submission advanced by counsel for the plaintiff is that if the defendant chooses, as he does in his application, to strike out the writ of summons and the statement of claim he should have filed a conditional appearance; now that he has put in an unconditional appearance he is therefore barred from proceeding with the said application.

G The effect of conditional appearance is fully explained in *Mallal's Supreme Court Practice* (2nd Ed) para 12/1/3. Such an appearance reserves to the defendant 'the right to apply to the court to set aside the writ or service thereof for an alleged informality or irregularity which renders either the writ or the service invalid.'. The position in the instant case is different — the defendant is not challenging the validity of the writ or service thereof but proceeds on the premise that the plaintiff has no locus standi to bring the said suit against him, H the suit is clearly scandalous, frivolous, vexatious and/or an abuse of the process of the court as the alleged publication does not amount to defamation or sedition — the allegations do not evince any cause of action against him. In the circumstances I am satisfied that the course of action taken by the defendant is in line with O 18 r 19 of the RHC and that the application is made promptly, ie before service of the statement of defence on the plaintiff.

I I shall now revert to *Alor Janggus*. In the light of the authorities and the express provision of O 18 r 19 itself, the remark of Jemuri Serjan CJ (Borneo) in that case to the effect at p 258:

> It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19 but it is still open to them to have recourse to O 33 r 2 if they are so minded.

is, to my humble mind and with the greatest respect, rather unsettling. For such a statement implies that an O 18 r 19 application can only be made if the defendant had previously filed a *conditional* appearance (as opposed to an *unconditional* appearance). In all humility, I find great difficulty in understanding this proposition. First and foremost, the learned Chief Justice (Borneo) did not explain why the Supreme Court held such a view — that the filing of an unconditional appearance precludes a defendant from making an O 18 r 19 application; nor were authorities cited to support the proposition. I find that there is absolutely nothing either in the provision of O 18 r 19 or in the provisions of O 12 rr 6 and 7 (the provisions dealing with conditional appearance) that stipulates or implies that such an application cannot be made once an unconditional appearance has been filed. On the contrary, such a view as expounded by the Supreme Court appears to run counter to the express provision of O 18 r 19 which clearly stipulates that the application may be made at *any stage of the proceedings.* (Emphasis added.)

In the light of the implication of the Chief Justice's dicta, perhaps it might be of some relevance at this juncture to understand the meaning and purpose of a conditional appearance. According to *Mallal's Supreme Court Practice* (2 Ed) by Tan Sri Datuk Chang Min Tat at p 68:

> Conditional appearance, meaning of and effect of: The term 'conditional appearance' means an appearance in qualified terms, reserving to the appearing defendant the right to apply to the court to set aside the writ or service thereof for an alleged informality or irregularity which renders either the writ or the service invalid.

As to O 12 rr 6 and 7, these provisions read:

> 6 Conditional appearance
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> (1) A defendant to an action may with the leave of the court enter a conditional appearance in Form 16 in the action.
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> (2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the court otherwise orders or the defendant applies to the court, within the time limited for the purpose, for an order under r 7 and the court makes an order thereunder.
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> 7 Application to set aside writ, etc
>
> (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.

(2) An application under this rule must be made by summons.

It will be observed from these provisions that the filing of a conditional appearance is necessary, instead of an unconditional appearance, where the defendant intends to take any one of the following steps:

(a) to apply to the court for an order setting aside the writ;

(b) to apply to the court for an order setting aside the service of the writ;

(c) to apply to the court for an order setting aside the notice of the writ;

(d) to apply to the court for an order setting aside the service of the notice of the writ;

(e) to apply to the court for an order declaring that the writ has not been duly served on the defendant;

(f) to apply to the court for an order declaring that the notice of the writ has not been duly served on the defendant; or

(g) to apply to the court for an order discharging any order giving leave to serve the notice on him out of the jurisdiction.

It is very pertinent to note from the above passage of *Mallal's Supreme Court Practice* and the aforesaid analysis of rr 6 and 7 that the provisions do not encompass or envisage an O 18 r 19 application. The nature of an application under O 12 r 7 is not similar to that of an application under O 18 r 19. For one thing the former specifically refers to the *setting aside* of the writ while the latter specifically refers to the *striking out* of the *statement of claim* (or the *statement of defence*, as the case may be). What is alleged in an O 12 r 7 application is the informality or irregularity of the writ or the service of the writ. But this is not the case in an O 18 r 19 application. An application under O 18 r 19 does not attack the writ; but is directed at the statement of claim (or statement of defence, as the case may be). It is, therefore, clear that the filing of a conditional appearance has no bearing or relevance to the making of an application under O 18 r 19. (Emphasis added.)

In any case, as conceded by En Selva Balan for the plaintiff, the above brief remark by Jemuri Serjan CJ (Borneo) in *Alor Janggus* is merely an obiter dicta. For, in that case, whether or not the respondents could file an O 18 r 19 application, was not the issue before the Supreme Court. A mere obiter dicta of a higher court is not binding upon this court.

The second issue is this: Are the defendants precluded from making an application under O 18 r 19(1)(a) by reason of the fact that they had served their statement of defence? The learned counsel for the plaintiff submitted that they are. He cites the dicta of Idris J in *Tengku Jaffar* which I have quoted above but with emphasis on the following statement at pp 165–166:

> In the circumstances, I am satisfied that the course of action taken by the defendant is in line with O 18 r 19 of the RHC and that the application is made promptly, ie before service of the statement of defence on the plaintiff.

With respect, I cannot accept the contention by learned counsel that Idris J, by remarking that the application was made before the service of the

statement of defence, intended to enunciate the proposition that an application under O 18 r 19 must be made before the service of the statement of defence. The argument of the plaintiff (opposing the application) before the learned judge, that led to the above remark, was merely that the defendant in that case was barred from proceeding with the O 18 r 19 application because he (just as in the case before me) had put in an unconditional appearance. The plaintiff did not make an issue of the fact that the defendant had filed a statement of defence. As I see it, the learned judge, by his remark, was only emphasizing the fact that the application before him was made promptly.

However, although not referred to by learned counsel, *Mallal's Supreme Court Practice* appears to support the learned counsel's contention that the service of a statement of defence would preclude a defendant from making an O 18 r 19 application. For it is stated therein at p 226:

> Application: The rule states that the order may be made 'at any stage of the proceedings'. Still the application should be made promptly. An application to strike out a statement of claim should be made before serving the defence; ...

Be that as it may, with respect, I am unable to accept the submission of learned counsel. In view of the words '*at any stage of the proceedings*' in O 18 r 19, in my judgment, the better view would be as expressed by Zakaria Yatim J in *Bank Bumiputra Malaysia* and by Haidar J in *Jamir Hassan*, which I have referred to earlier in this judgment. Thus, the mere serving of a statement of defence is not a bar to the making of an O 18 r 19 application.

In conclusion, I hold in the present case that neither the filing of the unconditional appearance, nor the serving of the statements of defence, precludes the defendants from making an application under O 18 r 19.

Accordingly, this appeal is allowed with costs. Enclosure 7 is referred back to the SAR for the hearing of the application.

Appeal allowed.

Reported by Jafisah Jaafar